Public Prosecutor v Long Khan Chin

HIGH COURT (JOHOR BAHRU) — CRIMINAL TRIAL NO 45–78 OF 2002
JEFFREY TAN J
11 NOVEMBER 2009

Criminal Law — Dangerous drugs — Trafficking — No record of chemist's statement being accepted in evidence by trial judge's predecessor — Mistake only realised at close of defence submissions — Whether court entitled to assume weight of proscribed drugs as stated in charge

Acting on information received Chief Inspector Arshad bin Kamaruddin ('the CI'), and his raiding party divided into three groups lay in wait in front of a house situated in Taman Scientex, Johor Bahru. About two hours later a car bearing registration No JEE 4435 ('the car') driven by the accused, who was the sole occupant, stopped in front of the house. The accused alighted from the car carrying a black plastic bag in his right hand. The CI approached the accused, identified himself and seized the black plastic bag the accused was carrying. Inside the bag were found three packages containing a yellowish powdery substance which the government chemist analysed as 125.98g of monoacetylmorphine, a dangerous drug. The accused was charged with trafficking in 125.98g of monoacetylmorphine and eight witnesses were summoned by the prosecution to prove the charge. After the first five witnesses were heard the trial was adjourned, but when the trial resumed it was heard by a different judge ('the trial judge'), who did not have the benefit of the transcript of the evidence recorded by his predecessor. The trial judge was misinformed that the defence had not challenged the evidence as to the quantity and/or quality of the drugs in question and thus was of the view that the weight of the proscribed drugs as stated in the charge was not in issue. The trial judge thereafter proceeded to hear the sixth witness for the prosecution, the CI. The CI narrated the facts leading to the arrest of the accused and confirmed that the accused was the sole occupant of the car at the time when he was apprehended. At the close of the prosecution case, the accused submitted that trafficking had not been made out and that there was a discrepancy of 36g in the gross weight of the drugs as stated in the charge and that stated by the CI. Since there was no explanation for this discrepancy the accused submitted that it ought to be asked if the drugs exhibits were those recovered. The prosecution maintained that despite this discrepancy in the gross weight of the drugs, there was no doubt that the drugs exhibits tendered in court were the exhibits recovered. At the close of the prosecution case, the trial judge satisfied that the prosecution had made out a prima facie case called the accused to enter his defence. In his defence the accused submitted that he had visited the house

where he was arrested while he was sending home one Torai, whom he had met earlier in a coffee shop. According to the accused, the black plastic bag belonged to Torai who was sitting on the front passenger seat of the car with the said bag on the foot well in front of him. Then Torai had allegedly alighted from the car without the bag and the accused had gone back to the car to fetch the said bag from the car when he was arrested by the CI. It was thus the defence case that the accused was an innocent carrier without any knowledge of the contents of the bag. At the close of the entire case, the defence submitted that government chemist's statement that the drugs exhibits contained 125.98g of monoacetylmorphine (the chemist's statement) was not in evidence. By then the defence had closed its submission and the only evidence on point was that the samples used by the chemist for analysis contained 0.174g of monoacetylmorphine.

Held, convicting and sentencing the accused to five years imprisonment:

(1) It was only at the close of the entire case, that it was discovered that there was no record of the chemist's statement being accepted in evidence by the trial judge's predecessor. Although a chemist report was tendered and marked as an exhibit there was neither a record in the transcript of the proceedings that the chemist report was ever tendered and marked nor any record in the chemist's primary evidence that his chemist report was so tendered in evidence. In the absence of such a record it could not be assumed as fact especially in the trial of a capital offence. Even if those shortcomings were to be overlooked, it remained that the chemist report was not any substantive evidence on the weight of the proscribed drugs in question. The chemist report was no substitute for parole evidence and thus it could not be held that there was any evidence that the drugs exhibits contained 125.98g of monoacetylmorphine. Thus on account of the fact that the weight of the proscribed drugs was not in evidence, the charge had to be amended to one of possession of 0.174g of monoacetylmorphine, which was the sample used by the chemist for the analysis (see paras 2–3).

(2) The prosecution's application to recall the chemist was refused because it was too late, in that the defence had already closed its submissions (see para 3).

(3) There was no other flaw in the prosecution case and there was no doubt as to the accused's guilt. In fact there was no defence as it was quite evident that the accused was not an innocent carrier (see paras 3 & 16).

[Bahasa Malaysia summary

Bertindak atas maklumat yang diterima, Ketua Inspector Arshad bin Kamaruddin ('KI') dan pasukan menyerbu yang dibahagikan kepada tiga kumpulan menunggu di hadapan sebuah rumah terletak di Taman Scientex,

Johor Bahru. Sekitar dua jam kemudian sebuah kereta nombor pendaftaran No JEE 4435 ('kereta tersebut') dipandu oleh tertuduh, yang merupakan satu-satunya penumpang, berhenti di depan rumah tersebut. Tertuduh turun dari kereta tersebut membawa satu beg plastik hitam di tangan kanannya. KI mendekati tertuduh, mengenalkan dirinya dan merampas beg plastik hitam yang dibawa oleh tertuduh. Di dalam beg tersebut telah ditemui tiga bungkusan yang mengandungi bahan berserbuk kekuning-kuningan yang mana ahli kimia kerajaan menganalisis sebagai 125.98g monoacetylmorphine, dadah berbahaya. Tertuduh dituduh dengan mengedar 125.98g monoacetylmorphine dan lapan saksi telah dipanggil oleh pendakwaan untuk membuktikan pertuduhan tersebut. Selepas mendengar lima saksi pertama perbicaraan telah ditangguhkan, tetapi apabila perbicaraan disambung semula ia telah didengar oleh hakim lain ('hakim perbicaraan'), yang tidak mempunyai manfaat transkrip keterangan yang direkodkan oleh hakim terdahulu. Hakim perbicaraan telah salah faham bahawa pembelaan tidak mencabar bukti berkenaan kuantiti dan/atau kualiti dadah diperkatakan dan oleh demikian berpandangan bahawa berat dadah yang diharamkan seperti yang dinyatakan dalam pertuduhan tidak menjadi isu. Hakim perbicaraan selepas itu meneruskan dengan mendengar saksi keenam untuk pendakwaan, KI tersebut. KI memberitahu fakta-fakta membawa kepada penangkapan tertuduh dan mengesahkan bahawa tertuduh ialah satu-satunya penumpang kereta tersebut pada masa dia ditangkap. Di penghujung kes pendakwaan, tertuduh menghujah bahawa pengedaran tidak dibuktikan dan bahawa terdapat satu perbezaan 36g dalam berat kasar dadah seperti yang dinyatakan dalam pertuduhan dan seperti yang dinyatakan oleh KI. Memandangkan tidak ada penjelasan bagi perbezaan ini tertuduh menghujahkan bahawa ianya harus ditanya sama ada ekshibit-ekshibit dadah tersebut adalah dadah yang ditemui. Pendakwaan menyatakan bahawa walaupun perbezaan dalam berat kasar dadah, tidak terdapat keraguan bahawa ekshibit-ekshibit dadah tersebut yang dikemukakan ke mahkamah adalah ekshibit-ekshibit yang ditemui. Di penghujung kes pendakwaan, hakim perbicaraan puas bahawa pihak pendakwaan telah berjaya membuktikan satu kes prima facie memanggil tertuduh untuk membela diri. Dalam pembelaannya tertuduh menghujahkan bahawa dia telah melawat rumah di mana dia telah ditangkap semasa dia sedang menumpangkan seorang bernama Torai, yang dia telah berjumpa terdahulu dalam sebuah kedai kopi, ke rumahnya. Menurut tertuduh, beg plastik hitam tersebut adalah kepunyaan Torai yang duduk di tempat duduk kerusi penumpang bahagian hadapan kereta tersebut dengan beg itu di hadapan kakinya. Torai telah dikatakan turun dari kereta tersebut tanpa beg itu dan tertuduh telah kembali ke kereta tersebut untuk mengambil beg itu apabila dia telah ditangkap oleh KI. Dengan itu adalah kes pembelaan bahawa tertuduh ialah seorang pembawa yang tidak bersalah tanpa sebarang pengetahuan mengenai kandungan beg tersebut. Pada penutupan keseluruhan kes, pembelaan menghujahkan bahawa kenyataan ahli kimia kerajaan bahawa ekshibit-ekshibit dadah mengandungi 125.98g monoacetylmorphine

(kenyataan ahli kimia) tidak ada dalam keterangan. Pada masa itu pembelaan telahpun menutup penghujahannya dan satu-satunya bukti adalah contoh-contoh yang digunapakai ahli kimia untuk analisis yang mengandungi 0.174g monoacetylmorphine.

Diputuskan, mensabit dan menghukum tertuduh lima tahun penjara:

(1) Hanya pada penutupan keseluruhan kes telah ditemui bahawa tidak ada rekod kenyataan ahli kimia yang diterima sebagai keterangan oleh hakim perbicaraan terdahulu. Walaupun laporan ahli kimia dikemukakan dan ditandakan sebagai satu ekshibit namun tidak ada sebarang rekod dalam transkrip prosiding bahawa laporan ahli kimia telah dikemukakan dan ditandakan mahupun sebarang rekod dalam keterangan utama ahli kimia bahawa laporan ahli kimianya telah dikemukakan sebagai bukti. Dalam ketiadaan rekod sedemikian ia tidak boleh dianggap sebagai fakta terutama sekali dalam satu perbicaraan kesalahan hukuman mati. Sekalipun kelemahan-kelemahan ini tidak diendahkan, ianya kekal bahawa laporan ahli kimia bukanlah bukti substantif berkenaan berat dadah yang diharamkan tersebut. Laporan ahli kimia bukanlah pengganti bagi bukti parol dan oleh demikian ia tidak mungkin diputuskan bahawa terdapat bukti bahawa ekshibit-ekshibit dadah tersebut mengandungi 125.98g monoacetylmorphine. Maka mengambil kira fakta bahawa berat dadah yang diharamkan tidak terkandung dalam keterangan, pertuduhan perlu dipinda kepada milikan 0.174g monoacetylmorphine, yang merupakan sampel digunapakai oleh ahli kimia untuk analisis (lihat perenggan 2–3).

(2) Permohonan pendakwaan untuk memanggil semula ahli kimia telah ditolak kerana ia adalah terlalu lewat, dalam mana pembelaan telah pun menutup penghujahannya (lihat perenggan 3).

(3) Tidak ada kecacatan lain dalam kes pendakwaan dan tidak ada keraguan berkenaan kesalahan tertuduh. Malah tidak ada pembelaan kerana ia agak jelas bahawa tertuduh bukan seorang pembawa yang tidak bersalah (lihat perenggan 3 & 16).]

Notes

For cases on trafficking, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 126–137.

Cases referred to

Leow Nghee Lim v R [1956] MLJ 28, HC (refd)
Muhammed bin Hassan v PP [1998] 2 MLJ 273; [1998] 2 CLJ 170, FC (refd)
Ong Ah Chuan v PP; Koh Chai Cheng v PP 1981 1 MLJ 64, PC (refd)
PP v Abdul Manaf bin Muhamad Hassan [2006] 3 MLJ 193, FC (refd)
PP v Abdul Rahman bin Akif [2007] 5 MLJ 1; [2007] 4 CLJ 337, FC (refd)

PP v Boo Chew Hia [1963] MLJ 33, HC (refd)
PP v Reza Mohd Shah bin Ahmad Shah [2002] 4 MLJ 13, HC (refd)
PP v Samsul Kamar bin Mohd Zain [1988] 2 MLJ 252, HC (refd)
PP v Tan Kim Piow [2006] 5 MLJ 409; [2006] 3 CLJ 717, CA (refd)
PP v Tan Tatt Eek and other appeals [2005] 2 MLJ 685; [2005] 6 AMR 543, FC (refd)
Ramis a/l Muniandy v PP [2001] 3 SLR 534, CA (refd)
Warner v Metropolitan Police Commissioner [1968] 2 All ER 356, HL (refd)
Y Jeyamuraly a/l Yesiah v PP [2007] 5 MLJ 224; [2007] 5 CLJ 605, CA (refd)

Legislation referred to

Criminal Procedure Code s 399(1)
Dangerous Drugs Act 1952 s 37(d), (da), (da)(iii)

Juanita bt Mohd Said (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution.
Hisyam Teh Poh Teik (Teh Poh Teik & Co) for the accused.

Jeffrey Tan J:

[1] The accused was tried for the following capital offence.

> Bahawa kamu pada 5.11.2001 jam lebih kurang 2.00 petang di hadapan rumah No. 16, Jalan Kancil 15, Taman Scientex, Masai, dalam Daerah Johor Bahru, dalam Negeri Johor telah didapati mengedar dadah berbahaya iaitu 125.98 gram monoacetylmorphine dan dengan itu kamu telah melakukan satu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

[2] Eight witnesses were summoned by the prosecution to prove the charge. Of those eight witnesses, five had testified before my predecessor. They were two police photographers (PW1 and PW2), two police storekeepers (PW3 and PW4) and a government chemist (PW5). I had conduct of the trial from the stage of PW6, who was the investigation officer. At the close of the prosecution case, I called the accused to enter upon his defence. I was then satisfied that the prosecution had made out a prima facie case. But during submissions at the close of the entire case, it dawned upon me that I should not have called the accused to enter upon his defence on the trafficking charge. Rather, at the close of the prosecution case, I should have amended the trafficking charge to one of possession of 0.174g of monoacetylmorphine. The faux pas came about like this. When I was about to resume trial, I had not the benefit of the transcript of the evidence recorded by my predecessor. I asked both the learned DPP and counsel to relate the proceedings that had transpired. The learned DPP related that five witnesses had testified before my predecessor (see p 16 of the notes of

proceedings — NP). Learned counsel related that the evidence of the chemist ('PW5') was only challenged on the point of the sufficiency of sample (see 17NP). I was given the picture, or perhaps I thought that was so, that the weight of the proscribed drugs as stated in the charge was not in issue or in controversy, and that the weight of proscribed drugs as stated in the charge was in evidence. I was under the impression that there was nothing controversial in the evidence recorded so far. Even after SP6 had testified, I was still informed that the defence had not challenged the evidence as to the quantity and or quality of the drugs in question (see 25NP). But at the stage of submissions at the close of the entire case, I found to my horror that the weight of the proscribed drugs as stated in the charge was not in evidence. At the stage of submissions at the close of the entire case, learned counsel submitted that the 'statement' of PW5 was not in evidence (see 67NP). By then, all parties had possession of the transcript of the evidence of PW5. Apparently, that aforesaid 'statement' was a pre-prepared statement by PW5 of his (intended) testimony. At 10NP, PW5 testified 'saya ada sediakan keterangan bertulis dalam kes ini'. Inter alia, that 'statement' of PW5 stated that upon analysis it was found that the three packages marked A1–A3 contained 125.98g of monoacetylmorphine. Nonetheless, there was no record (see 10NP–13NP) in the transcript of the proceedings that that 'statement' of PW5 formed part of the evidence. There was no record that that 'statement' was ever read in court by PW5 and or that that 'statement' had been accepted in evidence by my predecessor. In the absence of such a record, I could not assume as fact, surely not in the trial of a capital offence, that that statement was in evidence.

[3] The learned DPP, Puan Juanita bt Mohd Said, contended that the chemist report was proof of the weight. From the endorsement on it, it would seem that a chemist report was tendered and marked as exh P9 on 28 September 2006. But there was no record in the transcript of the proceedings that the chemist report was ever tendered and or marked. There was also no record in the primary evidence of PW5 that P9 was his chemist report. But even if those shortcomings were to be overlooked and it were to be accepted that the chemist report was in evidence, it remained that the chemist report was not any substantive evidence on the weight of the proscribed drugs in question (see *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273; [1998] 2 CLJ 170, where it was held by the Federal Court per Chong Siew Fai CJ (Sabah and Sarawak) that the prosecution is not precluded from calling the chemist (the maker of the report) to prove its case in the ordinary way solely because it has served a copy of the report on the accused prior to the commencement of the trial pursuant to s 399(1) of the Criminal Procedure Code, but that the report of the witness is no more than corroborative evidence). Where the maker is called, his report is not substantive evidence. P9 was no substitute for parole evidence. In the result, I could only hold that there was no evidence that the drug exhibits contained 125.98g of monoacetylmorphine. In relation to the weight of the proscribed drugs, the only evidence on point was that the samples

used by the chemist for analysis contained 0.174g of monoacetylmorphine. Application was made by the prosecution to recall PW5. But by then, the defence had closed its submission and it was then too late (see *Public Prosecutor v Boo Chew Hia* [1963] MLJ 33; *Public Prosecutor v Samsul Kamar bin Mohd Zain* [1988] 2 MLJ 252) to allow such application which accordingly was refused. There was no other flaw in the prosecution case. There was no doubt as to guilt. But on account of the fact that the weight of proscribed the drugs was not in evidence, I had no alternative but to amend the charge and record a conviction for possession of 0.174g of monoacetylmorphine. Under the circumstances, I could do no more than impose, which I imposed, the maximum sentence of five years imprisonment from the date of arrest.

[4] All the same, I should still give my reasons for calling and then rejecting the defence.

[5] The only witnesses at the scene were PW7 and PW8, who gave the following collective story. At 10.20am on 5 November 2001, PW7 (Chief Inspector Arshad bin Kamarddin) received information on drug trafficking activities at Jalan Kancil, Taman Scientex, Johor Bahru involving a car bearing registration No JEE 4435 (note that evidence was admitted as proof of the fact that such information was received, but not as proof of the facts asserted in the said information). At 11am, PW7 briefed the raiding party comprising ten men. PW7 divided the raiding party into three groups. At 12.30pm, PW7 and Group 1 were at their assigned position, that is, in front of house No 16, Jalan Kancil 15, Taman Scientex, Johor Bahru (house 16). Group 2 took position along Jalan Kancil 15, while Group 3 was at about 100m away from house 16. Two hours later, a car with registration No JEE 4435 ('car') stopped in front of house 16. The driver was the accused who was the sole occupant of the car. The accused alighted from the car and closed the door of the car. The accused had a 'bungkusan' in his right hand. PW7 ordered Groups 1 and 2 who were seated in their respective vehicles to close in on the accused. Group 1 stopped their vehicle next to the right front door of the car. Group 2 stopped their vehicle behind the car. According to PW7, 'Pada masa yang sama pemandu tersebut cuba melarikan diri dan berlaku pergelutan anggota dengan pemandu' (see p 28NP). According to PW8 (Sergeant Mohd Isa bin Jalil), 'Pemandu dalam keadaan terkejut dan takut ... semasa membuat tangkapan, pergelutan berlaku'. PW7, Sergeant Isa and Corporal Nor Adnan apprehended the accused. PW7 identified himself and seized the black plastic bag from the right hand of the accused (see 28NP). PW7 untied that bag in the presence of the accused (see 29NP). Inside that bag were three packages wrapped in newspapers. Inside each of those three packages was a clear plastic packet containing yellowish powdery substances. Sergeant Isa handcuffed the accused. PW7 frisked the body of the accused. PW7 seized the ignition key of the car from the left hand of the accused. There was nothing incriminating inside the

car. Thereafter, PW7 and the raiding party proceeded to the police contingent headquarters together with the accused and exhibits recovered. At the police contingent headquarters, PW7 marked the exhibits recovered with his signature and pertinent date, lodged his report, and prepared the search list. That evening, at 6pm, PW7 handed the accused and exhibits recovered to PW6.

[6] As the prosecution unfolded its case, the defence gave notice of its case, namely, that one Torai was an occupant of house 16, that Torai was seated inside the car, and that Torai was the owner of the exhibits recovered. It was put to PW6, to which PW6 said that he had no knowledge thereof, that the said Torai lived at house 16. It was put to PW7, to which PW7 refuted, that there was a person of Indian ethnicity seated on the front passenger seat of the car, that the accused had nothing in his hands when he alighted from the car, that the accused and Torai entered the outer compound of house 16 whereat Torai spoke to the accused, that the accused proceeded to the car and retrieved the said bag from the foot well of the front passenger seat, that the accused then returned to the outer compound of house 16, that thereafter the accused was arrested in the outer compound of house 16, that the accused made no attempt to escape, that the accused said to PW7 that the bag did not belong to him but to Torai, that the accused had given a lift to Torai to house 16, that Torai had brought the bag into the car, that Torai had asked the accused to fetch the bag from the car, that the accused had no knowledge of the contents of the said bag, and or that the accused was arrested at 4pm and not at 2pm. PW7 maintained that there only one occupant in the car, that only one person alighted from the car, that the accused had not entered the compound of house 16, and that the accused was arrested outside the outer gate of house 16 at 2pm. PW8 was not cross-examined, but it was underscored by learned counsel that the story of the prosecution was nonetheless challenged.

[7] At the close of the prosecution case, Mr Hisyam Teh for the accused contended that trafficking had not been made out. He made the following arguments. There was a discrepancy of 36g in the gross weight of the drugs. It was stated in the charge before the magistrate that the gross weight of the substance was 1,410g. But it was stated by the investigation officer that the gross weight was 1,374g. There was no explanation for that discrepancy in the weight. It ought to be asked if the drug exhibits were those recovered. It was only a case of passive possession. In *Public Prosecutor v Tan Tatt Eek and other appeals* [2005] 2 MLJ 685; [2005] 6 AMR 543, the Federal Court held that s 37(d) could not be invoked together with s 37(da). There must be an overt act (counsel cited *Public Prosecutor v Tan Kim Piow* [2006] 5 MLJ 409; [2006] 3 CLJ 717 and *Y Jeyamuraly a/l Yesiah v Public Prosecutor* [2007] 5 MLJ 224; [2007] 5 CLJ 605). In *Public Prosecutor v Tan Kim Piow*, both Court of Appeal and Federal Court held that s 37(d) must be invoked to prove knowledge of the

contents. There were no facts to infer knowledge in the instant case. Section 37(d) must be invoked. Therefore, s 37(da) could not be invoked. Without s 37(da), trafficking could not be proved.

[8] The learned deputy public prosecutor, Puan Juanita bt Mohd Said, submitted as follows. In *Public Prosecutor v Abdul Rahman bin Akif* [2007] 5 MLJ 1; [2007] 4 CLJ 337, the Federal Court disagreed with the proposition that an accused could not have knowledge if the view of the drugs was obscured by wrappings. In *Leow Nghee Lim v R* [1956] MLJ 28, Taylor J defined possession as being with some but not full knowledge. The drugs involved were eight times more than 15g. In *Ong Ah Chuan v Public Prosecutor; Koh Chai Cheng v Public Prosecutor* 1981 1 MLJ 64, it was held that the greater the amount, the greater the inference that it was not intended for personal consumption. In *Public Prosecutor v Abdul Manaf bin Muhamad Hassan* [2006] 3 MLJ 193, the Federal Court held that the prosecution could rely on s 37(d) or s 37(da). Possession was proved by direct evidence in the instant case, and s 37(da) must be invoked.

[9] At the close of the prosecution case, the accused was ordered to enter upon his defence. The prosecution story was challenged, but there was no doubt whatsoever that a prima facie case had been made out. The fact of the matter was that the accused was found in actual physical possession of proscribed drugs. The accused had the proscribed drugs in his right hand. Notwithstanding the difference in the gross weight stated in the charge laid before the learned magistrate and the gross weight stated by PW6, there was no doubt whatsoever that the drug exhibits tendered in court were the exhibits recovered. Logically, the accused could not have been unaware of that which was in his right hand. There was clear proof of actual physical possession and knowledge of that possession. As for specific knowledge of the contents of the plastic bag, that could be inferred (for a detailed discussion on the proof of knowledge by drawing inferences, see *Public Prosecutor v Reza Mohd Shah bin Ahmad Shah* [2002] 4 MLJ 13) from the facts and circumstances (see *Public Prosecutor v Abdul Rahman bin Akif* [2007] 5 MLJ 1; [2007] 4 CLJ 337, where it was held by the Federal Court per Arifin Zakaria FCJ, as he then was, that the fact that the contents were hidden from view, while relevant in determining whether the requisite knowledge was absent, should still not be given too much weight, and that the finding of knowledge, or the rebuttal of it, is an inference to be drawn from all the facts and circumstances, giving due weight to the credibility of the witnesses). In *Warner v Metropolitan Police Commissioner* [1968] 2 All ER 356, where the House of Lords was asked to answer if a defendant is deemed to be in possession of a prohibited substance when to his knowledge he is in physical possession of the substance but is unaware of its true nature, Lord Reid held that it would be pedantic to hold that it must be shown that the accused knew precisely which drugs he held in his possession.

A And in *Ramis a/l Muniandy v Public Prosecutor* [2001] 3 SLR 534, it was held by the Singapore Court of Appeal that physical control in the absence of any reasonable explanation was sufficient to lead to a strong inference of knowledge. In the instant case, both the demeanour of the accused and attempt by him to resist arrest indicated that the accused must have had guilty B knowledge of the contents of the plastic bag. The absence of an explanation for the physical possession was not consistent with innocence. Given the instant facts and circumstances, the accused must have had knowledge of the contents of the bag. In the result, the finding was that the accused had actual physical possession of those proscribed drugs with all requisite knowledge.

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[10] There was no direct evidence of a trafficking activity. But s 37(da)(iii) of the Dangerous Drugs Act 1952 provides that any person who is found in possession of 15g or more in weight of monoacetylmorphines otherwise than D in accordance with the authority of this act or any other written law, shall be presumed, until the contrary is proved, to be trafficking in the said drug. Section 37(da) was invoked. Trafficking had been made out. The accused was ordered to enter upon his defence.

E **[11]** The accused testified as follows. He was a furniture sub-contractor. He also dealt in direct sales of Eiken health products. He was arrested at 4pm. At 3pm on 5 November 2001, he was having tea with Peter and Torai, in a coffee shop at Taman Johor Jaya, Johor Bahru. He was there to sell Eiken products to Peter who was a wireman. Peter had introduced Torai to him. He had met Torai F on five or six occasions. Peter asked him to send Torai home. He agreed to do so. Peter settled the bill. Torai wanted to buy something. Torai asked him to wait for him (Torai) in his (accused) car. About three minutes later, Torai returned with a black plastic bag in his hand. At that time, it did not cross his mind that the plastic bag contained drugs. Torai got into the car and sat on the G front passenger seat. Torai placed the black plastic bag on the foot well in front of him (Torai). Torai told him that he lived at Taman Scientex, Masai, Johor Bahru. He drove to that address. Upon arrival, he and Torai alighted from the car and entered the compound of the house. Just as Torai was about to open the door of the house, he (Torai) asked him to fetch the black plastic bag from the H car. He went back to the car and took the black plastic bag from the front passenger seat. He locked the car door. He re-entered the compound of the house. He wanted to hand the black plastic bag to Torai. He heard the sound of a car braking. He turned around. He saw four men, including SP7, rushing out from a car. They entered the compound of the house, shouting 'police'. SP7 was I the first to stand in front of him. He asked as to what was going on. SP7 did not answer. SP7 took away the black plastic bag from his hand. SP7 took his car ignition key from his trouser pocket. Two persons held him. SP7 opened the black plastic bag in front of him. SP7 informed him that the black plastic bag contained dangerous drugs. He was shocked to learn of that. That was the first

time he knew of the contents of that bag. He did not resist arrest. He told SP7 that the black plastic bag belonged to Torai. He told SP7 that Torai had asked him to fetch that bag and that he had no knowledge of the contents of the bag. While that was going on, Torai was inside the house. He was put inside a vehicle. SP7 and some others entered the house. They were inside the house for about ten minutes. When SP7 was back, he asked 'mana Torai, mengapa tidak menangkap Torai?' But SP7 did not arrest Torai. He was arrested inside, not outside, the compound of the house.

[12] Under cross-examination, the accused denied that his story of Torai, was an invention, that he had knowledge of the contents of the bag, that he had opportunity to inspect the contents of the bag, and or that he resisted arrest and attempted to flee. The accused was not re-examined.

[13] At the end of the entire case, Mr Hisyam Teh submitted that there was prior notice of the defence case, that the accused was an innocent carrier without any knowledge of the contents of the bag, that the defence story was only generally but not specifically challenged, that there was a difference in the gross weight as stated in the charge laid before the magistrate and as stated by PW6, and, that the statement by the chemist was not in evidence.

[14] The learned DPP contended that the weight of the proscribed drugs was proved by the chemist report (P9), that the things on the front passenger seat precluded the possibility of a passenger in the car, that Torai would have been arrested if there had been a 'Torai', if he were there, that there was no reason for the prosecution to lie about the events, that the evidence of the investigation officer was that the house was unoccupied, that house keys were not recovered from the accused, and, that there was no truth in the defence that the accused was arrested inside the compound of the house. The last word from the learned DPP was that the defence had failed to cast any doubt on the prosecution case.

[15] Evidently, the defence of innocent carrier was entirely dependent on 'Torai' being at the scene. Without 'Torai' at the scene, the entire defence story could not take off. But was there any evidence to suggest that there was or there could be a 'Torai' at the scene? PW7 and PW8 were clear and definite that the accused was the sole occupant of the car. Indeed, it would not stand to reason that the accused would be the only person arrested, if there was another person with the accused at the scene. If there was another person with the accused at the scene, then that person would surely have been arrested as well.

[16] It would not stand to reason that that other person could or would have been allowed to leave the scene just like that. At least, that other person could not and would not have escaped the notice or attention of the members of the

raiding party. But yet all witnesses firmly testified that the accused was the only occupant of the car and was the only person who alighted from the car. Just after the accused had alighted from the car, PW7 ordered Group 1 and Group 2 to close in on the accused. Group 1 was then in front of house 16, while Group 2 was not far away. It would have taken only seconds for Group 1 and Group 2 to close in and get to the accused. Within that time that would have elapsed, it would not have been possible for the accused to have entered into the compound of house 16, to have been asked by 'Torai' to fetch the black bag from the car, to have returned to the car to retrieve the black bag, and to have re-entered the compound of house 16 with the black bag. In the final analysis, it would only seem that there could not have been a 'Torai'. The very being of 'Torai' at the scene was not plausible. The accused might have given notice of his defence case, but 'Torai' was nonetheless, no less, an invention. The events at the scene, as related by the accused, could not have happened. There was no defence. There was no doubt that the accused was not an innocent carrier.

Accused convicted and sentenced to five years imprisonment.

Reported by Kohila Nesan